



GENERAL COMMENTS

Students generally adapted well to the new examination format for Legal Studies, which saw an increase in marks to 70 and the removal of a 'choice' question at the end of the examination paper. Students also responded well to the revised study. Some areas of the study that require more attention include civil pre-trial procedures, the way in which courts and VCAT operate to resolve disputes, doctrine of precedent, methods of changing constitutional power and recent changes in the legal system.

There were some common misunderstandings evident in student responses. Committal hearings were confused with directions hearings, and some students incorrectly stated that the doctrine of precedent is about sentencing in a criminal case. Finally, students need to practise explaining things without repeating the term itself. For example, some students explained the term 'structural protection of rights' by using the same words: 'structural protection of rights is the way the structure of the constitution protects rights'. The same issue arose when discussing exclusive powers in Question 1.

Time management in the examination is crucial. The examination was marked out of 70 and students had two hours to complete it. The marks available for each question should give students some guidance as to how much time they should spend on each answer. Continually practising questions under examination conditions is the best way for students to learn how to organise time. Students should also make good use of the reading time by formulating a response to each question and developing a plan for the extended response question.

Good examination technique is important. Where students continue their answers on the extra lines at the end of the examination booklet, they should make a note that the answer is 'continued in extra space'. Black or blue pen rather than pencil should be used, and good paragraphing is important, particularly for the extended response question. Students should respond directly to short answer questions; for example, a good answer to Question 8a. needed little more than one or two sentences. Furthermore, students are expected to spell correctly, particularly legal terminology such as 'trial' (rather than 'trail') and parliament.

Some improvement is needed with the way that students formulate their answers. There was an over-reliance on answers prepared in detail prior to the examination. While students should refer to past Assessment Reports in preparing for the examination, they should not use them to prepare rote-learned answers. It is very important that students' responses relate directly to the question asked and contain material that is relevant to that question. An example of this was Question 8b., which required students to explain whether or not judges would be bound by a precedent made in the Supreme Court (Trial Division) and to what extent. Students need to think about what the question was asking them to do and what material was relevant to this question. Students should avoid writing everything they know on the topic.

Students need to focus on the skills required to analyse and evaluate. Question 10 required an analysis of the impact of the referendum process, High Court interpretation or referral of powers on the division of law-making powers. This required a consideration of whether one of those methods has impacted on the law-making powers, to what extent, and why or why not. Many students responded to this question by merely outlining the referendum process, or giving an example of a High Court case or an example of when a state has referred its law-making powers. These responses did not answer the question properly. 'Evaluate' also needs to be better understood by students. This skill requires a consideration of strengths and weaknesses and also a judgment as to how good or bad something is. Students should also note that a comparison requires a consideration of both similarities and differences.

SPECIFIC INFORMATION

Question 1

Marks	0	1	2	Average
%	14	29	57	1.5

Full marks were awarded for a clear distinction between exclusive and residual powers. Students were required to make the point that exclusive powers are law-making powers held by the Commonwealth Parliament, whereas residual powers are law-making powers retained by each of the states. Further points that could have been made include:

- some exclusive powers are further protected by other sections of the Constitution, such as section 115 (coining money), but state powers are only recognised by section 107
- exclusive powers are usually those powers given to the Commonwealth that affect the entire nation, such as defence, currency and customs, whereas residual powers are often those that can affect states in different ways (traffic and roads, local government, crime, etc.)



- exclusive powers are specifically listed under the Constitution, for example some powers under section 51, whereas residual powers are those left with the states at the time of federation and not listed in the Constitution.

While students responded well to this question, some responses were only awarded one mark if there was not enough depth in the answer, or if the two powers were described but there was no distinction between them. A common weak response stated 'exclusive powers are held by parliament, but residual powers are held by the states'. Students need to be careful with their wording, as a mistake such as this, where the word 'Commonwealth' was not inserted before the word parliament, cannot gain marks.

The following is an example of a good answer.

Exclusive powers are a subset of specific powers and are established under sections 51 and 52 of the Constitution. These powers are only exercisable by the Commonwealth Parliament; no other parliament has power in these areas. Residual powers, on the other hand, are not stated in the Constitution and unlike exclusive powers rest solely with the states.

Question 2

Marks	0	1	2	3	Average
%	16	14	30	40	2

Some of the purposes of a committal hearing are to:

- determine whether there is evidence of a sufficient weight to support a conviction for the offence charged
- determine whether a charge for an offence is appropriate to be heard and determined summarily
- determine how the accused proposes to plead
- ensure the prosecution's case is adequately disclosed
- enable the accused to hear evidence against him or her and cross-examine witnesses
- enable the accused to put forward a case at an early stage
- enable the issues in contention to be adequately defined.

Students were required to explain how one of these purposes promotes the timely resolution of a criminal case.

Depending on the purpose put forward by the student, the following points could have been made:

- a committal hearing ensures that only those cases with sufficient evidence go to trial, therefore the Supreme Court and County Court will have more time to deal with cases where there is enough evidence to convict
- an outcome by a magistrate that there is insufficient evidence for the defendant to stand trial avoids a situation whereby the defendant and the case get 'clogged up' in the criminal justice system, thus causing delays
- one of the outcomes of a committal hearing may be that an accused is committed to stand trial on some, but not all, of the charges. This will reduce the time involved in preparing for the case and the length of the trial if there are a reduced number of charges
- the case may be so strong that the accused decides to plead guilty before going to trial, thus resulting in an early resolution of the case
- where issues in contention are adequately defined and where both the prosecution and the accused may agree on some of the issues, this may reduce the time needed for a trial.

This question required students to make the link between one of the elements of an effective legal system (timely resolution of disputes) and committal hearings. Students are expected to know how the processes and procedures of our legal system achieve, or do not achieve, each of the three elements. Many students were able to make this link; the more common responses discussed how committal hearings determine whether there was sufficient evidence to support a conviction at trial and explained how that contributes to the timely resolution of a criminal case.

The less successful responses confused committal hearings with directions hearings. Other students were able to describe the purpose of a committal hearing but could not explain how it promoted the timely resolution of a criminal case. Other descriptions of the purpose of a committal hearing were too brief; for example, 'a committal hearing determines whether there's a prima facie case', without any explanation of what that means.

The following is an example of a good answer.

Committal hearings are conducted in the Magistrates' Court when a person has been charged with an indictable offence. One purpose is to determine whether there is sufficient evidence to support a conviction at trial in the County or Supreme Court. This promotes the timely resolution of criminal cases by ensuring that the courts are able to have the time to deal with only the strong cases, therefore saving time by not having to deal with weak cases which should not otherwise proceed to trial.

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Question 3

Marks	0	1	2	3	Average
%	4	14	30	52	2.3

This question required students to put forward an opinion as to whether the Victorian legal system would improve if there was one level of courts. The discriminating factor was the justification provided for the opinion. The response could either be stated in the first or third person, or as a general statement, but the opinion needed to be evident.

Where students argued that the legal system would not improve, one or all of the following points could have been made:

- the hierarchy allows a system of appeals to operate, under which the higher courts can review the decisions of lower courts, thereby allowing for corrections in errors made by the lower court
- the hierarchy allows the courts to specialise. For example, the Magistrates' Court can deal with every day and/or minor civil and criminal matters, the County Court can operate jury trials and more complex civil cases, and the Supreme Court and the Court of Appeal can deal with more complex questions of law
- the hierarchy allows the doctrine of precedent to operate, with the higher courts indicating to the lower courts which precedents should be followed (thus allowing for consistency)
- it is administratively more effective, and a more rational use of resources, to have the more common problems dealt with at local court level, while rarer and more complex problems can be dealt with centrally
- one level of courts would cause time delays in hearing matters and a backlog of cases, thus resulting in greater injustice for parties wanting to have their case resolved.

Some students argued that the legal system would improve. Again, this was acceptable, as long as they justified their opinion. Some of the reasons that could have been put forward were convenience (where, like VCAT, there is one court where all disputes are heard and parties are not inconvenienced or confused by the various courts) and specialisation (where, like VCAT, the one court could still specialise by separating into divisions or lists).

The following is an example of a good answer.

I do not believe that the Victorian legal system would improve if there was only one level of courts. There are many reasons for retaining a court hierarchy. One of the more important reasons is that it allows for a system of appeals. If an individual has grounds for an appeal, they may appeal to a higher court to have their decision reviewed. This could not operate effectively with only one level of courts. Another more important reason for a hierarchy is that it allows for the doctrine of precedent to operate, which relies on the existence of lower courts following the rulings of higher courts in like cases.

Question 4

Marks	0	1	2	3	Average
%	47	8	18	27	1.3

Full marks were awarded to responses that provided a good explanation of a recent change and described how that change was designed to improve the operation of the legal system. Only two marks were awarded if students detailed the recent change, but made no attempt to explain how it could improve the legal system.

While some students provided a good description of a recent change, many did not explain how it would improve the legal system. The more successful students used the elements of an effective legal system to explain how the recent change would improve the legal system. Some of the more popular responses included the expansion of the Koori Courts, amendments to the *Juries Act 2000* and changes to criminal procedure in Victoria. Some students had limited knowledge of what the Koori Court does; more work is required in this area.

This was a challenging question for some students. It was disappointing to see that many students did not attempt this question, used changes that were not recent or discussed changes to specific laws rather than changes to the legal system. Students should keep up to date with changes made recently within our legal system. For example, the retirement age of judges is so entrenched in our legal system that the impact is no longer relevant and so no marks would be awarded for a response such as this.

Some recent changes that were used by students were as follows:

- increased use of the Koori Courts and the expansion of those courts into more regional areas such as Mildura, Bairnsdale, Shepparton and Broadmeadows, as well as the introduction of the Koori Court in the County Court
- increased use of neighbourhood justice centres, including the new William Cooper Justice Centre in Melbourne

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- introduction of the *Civil Procedure Act 2010* in Victoria, designed to increase management of cases, encourage out of court settlements and enforce the obligations of parties to act honestly and cooperate with each other
- increased use of alternative or appropriate dispute resolution methods by VCAT and the courts, particularly mediation
- changes to the *Bail Act 1977* which came into effect in January 2011, which included new provision for Aboriginal Australians (including requirements to take into account a person's cultural background, including the person's ties to extended family or place, or any other relevant cultural issue) and provisions relating to bail justices (such as fixed term appointments for five years and a code of conduct)
- amendments to the *Juries Act 2000* in 2008, which restricts persons who are on a panel for a trial or jurors from making enquiries about trial matters
- amendments in 2010 to the *Criminal Procedure Act 2009*, including the imposition of time constraints as to when certain documents must be provided or served, including the preliminary brief.

The following is an example of a good answer.

One recent change is the 2008 amendments to the Juries Act 2000. The change prohibited jurors from undertaking any form of enquiry regarding information on the trial on the case they are deliberating on. This promotes the entitlement of the defendant to a fair and unbiased hearing, as juries will therefore be basing their decision solely on the evidence before them and not on material that could be biased or prejudiced against the defendant.

Question 5a.

Marks	0	1	2	Average
%	31	23	46	1.2

The discriminating factor in this question was the level of explanation. A brief explanation or mere identification of an effect was only awarded one mark.

Some of the effects of statutory interpretation are that:

- courts can give meaning to words which can then be followed in the future by other judges or courts, even for other legislation
- interpreting a statute means the parties to the case are bound by that decision and future similar cases with similar situations in the same court hierarchy are bound by the decision (unless otherwise reversed or abrogated)
- by reason of precedent being set, the interpretation can often allow future parties to predict the outcome in light of how the statute is to be applied
- it extends the law – if courts apply a broad interpretation, that Act of Parliament can often be extended to situations not otherwise anticipated by the law-makers.

The less successful students confused the effects of statutory interpretation with reasons why courts may be required to interpret a statute.

The following is an example of a good answer.

One effect of statutory interpretation is that it can expand the law. Where the court has interpreted the word or phrase within the statute in a broad way, the law can be extended and cover other situations or circumstances which may not have otherwise been intended by parliament.

Question 5b.

Marks	0	1	2	Average
%	37	20	43	1.1

A full description of one of the relationships between courts and parliaments in law-making was required. Brief responses were only awarded one mark.

Students could have used one of the following points:

- parliament can legislate to codify common law. The primary source of that area of law then becomes the relevant statute and is subsequently interpreted by the courts
- parliament can override a particular common law rule by enacting legislation relating to that rule. For example, the common law defence of provocation in relation to a murder charge was amended by parliament
- where the courts have interpreted a provision of a statute in a particular way, and parliament is dissatisfied with this interpretation, parliament can override the courts' interpretation by amending the statute

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- the courts can declare that a statute is invalid on the grounds that it was beyond the powers of parliament to pass such a law (ultra vires)
- judges can criticise obsolete law
- parliament can establish courts and alter their jurisdiction
- the Commonwealth and state Interpretation Acts set guidelines for courts on how to interpret statutes.

This question was generally handled well. It was pleasing to see a good understanding of the relationship between courts and parliaments in law-making.

The following is an example of a good answer.

The courts are created by acts of parliament. For example, the Supreme Court Act 1986 establishes the Victorian Supreme Court. Parliament can therefore create courts, abolish courts and can also alter their jurisdictions or create new divisions of the court.

Question 6a.

Marks	0	1	2	Average
%	41	22	37	1

This question reflected new material in Unit 3, Area of Study 2. Students were required to explain what was meant by the term 'structural protection'. The discriminating factor was the level of detail in the explanation.

The more successful students used specific examples from the Constitution to support their explanation, such as sections 7 and 24 (the houses of parliament having to be composed of members directly chosen by the people), the structural protection of the right to vote, the use of reserve powers to dismiss a government or the principles of our parliamentary system (the separation of powers, representative government and responsible government).

The less successful students were not able to explain what structural protection meant or were unable to explain how the Constitution protects rights through its structure.

The following is an example of a good answer.

The term 'structural protection' refers to the systems and mechanisms established by the Constitution, which indirectly protect rights. These structures include the principles of separation of powers, the requirement of the houses of parliament having to be directly chosen by the people as set out in sections 7 and 24 and the limited right to vote as established by the High Court in the Roach case. These structures indirectly prevent any abuse of power and ensure the rights of the people (such as their right to choose parliament) are protected.

Question 6b.

Marks	0	1	2	3	4	Average
%	24	11	16	23	25	2.1

Again, this question reflected changes in the key knowledge in Unit 3, Area of Study 2. Students were expected to know that express rights and implied rights are two other means by which the Commonwealth Constitution protects rights in Australia.

Some of the points that could have been made for each are as follows.

Express rights

- The Constitution contains a limited number of express rights, specifically written in the Constitution.
- Express rights can only be changed by the referendum process, which ensures sufficient protection of those rights.
- Some of the express rights are limited by nature:
 - freedom of religion – no law may establish a state religion, impose any religious observance, prohibit the free exercise of any religion or require a religious test as a requirement for Commonwealth office
 - interstate trade and commerce – interstate trade and commerce is to be free
 - discrimination – it is unlawful for state and Commonwealth Governments to discriminate against someone on the basis of that person's state residence
 - just terms when acquiring property – the Commonwealth must provide 'just terms' when acquiring property
 - jury trial – there must be a jury trial for indictable Commonwealth offences.



Implied rights

- The High Court's role is to interpret the Constitution when required in certain cases. It is able to imply rights from the Constitution.
- The High Court has found that the Constitution contains an implied right to free political communication. The first High Court decision to recognise this was *Australian Capital Television v The Commonwealth*. There have been several cases since then that have discussed the extent of this right and the exact basis for it. In *Lange v Australian Broadcasting Corporation* these matters were clarified. The court found that the requirement can be drawn from sections 7, 24, 64, 128 and other related sections in the Constitution.
- The court has not found that a general right to free speech is implicitly protected by the Constitution but only a right in regard to matters which can be described as 'political communications'.

Some students wrote that the Commonwealth Constitution establishes the High Court and provides it with inherent jurisdiction to determine matters dealing with the Constitution, and because the High Court can declare a law 'ultra vires' if it infringes on an express (or implied) right, that this is also a means by which the Constitution protects rights. While this is not specifically listed in the study design, it is an acceptable response and those students who provided a good explanation of this were awarded two marks (and possibly a further two marks for their other means).

Weaker responses identified express and implied rights but did not provide enough detail to get full marks. Other students used examples of structural protection (such as representative and responsible government), which did not gain any marks.

Students also need to distinguish between 'means' and 'examples'. The three means listed in the study design are structural protection, express rights and implied rights. Examples could be used for each of the means to support an answer.

The following is an example of a good answer.

One other mean is through express rights. These are rights explicitly stated in the Constitution and can only be changed or removed through the process of a referendum. One example of an express right is the right to freedom of religion, which restricts the parliament from making a law imposing any religious observance or prohibiting the free exercise of any religion.

Another mean is through implied rights. These rights are not written in the Constitution but have been found through High Court interpretation to be implied by the wording of the Constitution. An example of an implied right is the right to freedom of political communication, protecting the rights of people to express opinions on parliamentary or political affairs.

Question 7a.

Marks	0	1	2	Average
%	10	35	55	1.5

Full marks were awarded to responses that used an example and explained how individuals or groups may use the media to influence legislative change. An important factor that many students did not cover was how the use of the media can influence legislative change. It was not enough to provide an example without explaining how it could be influential.

Stronger responses discussed recent examples, such as the use of television advertisements regarding WorkChoices, or how television and radio programs or social media sites can be influential by garnering enough responses and community support to attract the attention of a parliamentarian.

The following explanations could have been made:

- law-makers, particularly parliamentarians and government bodies, often keep track of media coverage and social media sites to gauge public opinion and public responses to the law or possible changes in the law
- parliamentarians themselves often have Twitter and Facebook accounts and use these to communicate directly with the public, thus allowing the public greater opportunity to influence change
- greater media coverage of opinions is likely to have more of an effect and could attract the interest of the public or even a parliamentarian
- letters, emails and responses to talkback radio can alert the public to a particular view or opinion, thus increasing debate and/or coverage
- the dramatic increase in the number of users of online media and social networking sites ensures a greater increase of people listening to views and talking about change.

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Examples could have been specific events or general examples such as:

- social media sites such as Twitter and Facebook
- letters and emails to a newspaper editor
- talkback radio (for example, ABC National, 3AW talkback)
- television programs investigating problems (Four Corners, Q&A, etc.)
- blogs
- television advertisements (for example, the union commercials about WorkChoices leading up to the elections)
- newspaper advertisements (for example, the 2010 advertisements funded by large businesses such as Harvey Norman regarding the GST on online shopping purchases).

This question was generally handled very well. Weaker responses did not provide any examples or did not explain the influence the example could have on legislative change. Responses that discussed other ways to influence change, such as petitions, did not gain marks.

The following is an example of a good answer.

Individuals or groups may use the media to bring an issue out in the public domain and have members of the community discussing the issue and putting pressure on their parliamentarians to make a change in the law. For example, the pressure group GetUp! uses a range of media such as advertisements, websites, twitter and Facebook to raise awareness of issues, encourage community members to sign petitions and communicate with parliamentarians.

Question 7b.

Marks	0	1	2	3	4	5	6	Average
%	10	11	17	23	17	11	11	3

An evaluation requires a consideration of strengths and weaknesses. As the question asked for an evaluation of two weaknesses, it required students to consider whether the weakness is in fact a weakness, or whether there is a corresponding strength which demonstrate that the weakness is not necessarily a bad thing. The calibre of the evaluation was the discriminating factor. Responses that only explained, rather than evaluated, two weaknesses were only able to gain a maximum of half the marks available.

Some of the weaknesses that could have been evaluated are:

- investigation and implementation of new law is time consuming and parliament is not always able to keep up with changes in society
- the process of passing a Bill is time consuming
- parliament is not always sitting, so changes in the law may have to wait some time
- parliament can make laws retrospectively
- parliament's Upper House can 'rubber stamp' or deliberately obstruct legislation
- parliament has the ability to delegate its law-making powers to bodies such as statutory authorities which are not voted in by the people, therefore they may not make laws that reflect community values.

Students were to consider each of their two weaknesses in light of their strengths. Some of the points that could have been made (depending on the weakness chosen) are:

- time – allows parliament to investigate the whole topic and make comprehensive laws
- time – parliament can also delegate its power to make law to expert bodies, thereby decreasing the time in which laws are made
- parliament has access to expert information and is therefore better able to keep up with changes in society
- certain legislation can be passed swiftly, depending on its urgency; for example, the terrorism legislation
- the fact that parliament can make laws retrospectively is a benefit as it ensures standards are set and laws are in place to deal with future situations
- rubber stamping can also decrease the time in which the Bill passes through the second house, particularly if it's an uncontroversial piece of legislation
- delegation – laws that are necessary for the community can be made swiftly by bodies that specialise in the relevant areas.

Stronger students were able to provide depth to each weakness and consider it in light of a corresponding strength. Paragraphing each weakness was helpful and should be encouraged.

Some students answered this question as if it asked them to evaluate two strengths. This type of response did not answer the question that was asked.



The following is an example of a good answer.

One weakness of parliament as a law-maker is that the process of debate and the passage of a bill through parliament is a lengthy process. This means that instant changes or developments to legislation do not occur, and causes delays to legislation that is often needed in society. However, this ensures that the legislation is thorough, effective and the views and perspectives of parliament are provided so that any necessary amendments can be made to the bill. Therefore, whilst the process is long, it ensures that statutes aren't hastily made and are considered thoughtfully and by all members of parliament.

Another weakness of parliament is that it is able to delegate much of its law-making powers to bodies that are not elected by members of the community. These bodies, such as local councils and statutory authorities, are not responsible and not necessarily accountable to the community given they are not elected. However, many of these bodies are experts in their area and therefore are more likely to make laws that are relevant and necessary for the community as opposed to parliament, which may not necessarily have expertise in a particular area (such as local traffic) to create the required laws. Also, given parliament has limited time already to make laws, it ensures that those bodies can make laws quickly without the need to go through the abovementioned passage of a bill.

Question 8a.

Marks	0	1	2	Average
%	30	27	43	1.1

Students should be familiar with the term 'original jurisdiction' and know that it includes both the court's civil original jurisdiction and criminal original jurisdiction. A mark was awarded for each of civil and criminal jurisdiction.

There is a common misunderstanding that the Supreme Court only hears civil matters 'over \$200 000'. The Supreme Court (Trial Division) has unlimited jurisdiction, meaning it can hear all civil claims of any amount. In relation to its criminal jurisdiction, students should be familiar with and use legal terminology and know that the Supreme Court (Trial Division) hears serious indictable offences. It was not enough to just say 'indictable offences' or 'serious offences'.

Weaker students identified the criminal original jurisdiction but not the civil original jurisdiction. Some students spent far too much time on this answer, providing a number of points that were not required (such as defining what is meant by 'original jurisdiction', which is not what the question asked). Students need to be careful to manage their time and only write material that is relevant to the question.

Question 8b.

Marks	0	1	2	3	4	5	Average
%	14	15	22	24	17	8	2.4

This question was related to the stimulus material at the start of Question 8. A new precedent had been created in the Supreme Court (Trial Division) and students were asked to justify to what extent judges are bound to follow that precedent in future cases. Students were required to give a statement as to what extent judges are bound to follow the new precedent and then provide a justification. This required a detailed consideration of the operation of the doctrine of precedent, the distinction between binding and persuasive precedents and methods that may be used to avoid following the precedent.

Some of the points that could be made are:

- some judges will be bound to follow the precedent, whereas others won't
- judges in lower courts, such as the Magistrates' and County Courts, will be bound to follow precedent
- judges in lower courts could use the distinguishing method to identify circumstances or facts in their case that are different to avoid following the new precedent
- judges in the same court (that is, the Supreme Court) will only be persuaded by the decision, but are likely to follow it given general apprehension by judges to overrule a previous precedent made by a judge in the same court
- judges from other hierarchies will only be persuaded
- judges from higher courts, such as the Court of Appeal and High Court, will only be persuaded by the precedent
- judges in higher courts who consider another case that has disapproved of the precedent can choose not to follow the precedent
- the judge on any appeal of the decision may reverse the decision
- parliament has the ability to abrogate the law made by the precedent, so judges may not be required to follow it if that happens.

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This was by far the question where the most ‘rote-learned’ or pre-prepared answers were given. It was disappointing to see that many students did not know how the methods of reversing, distinguishing, overruling and disapproving operate. In particular, a precedent does not change if a court disapproves of it, but this may be influential in future cases. It is important that students develop a working knowledge of the doctrine of precedent and are able to apply that knowledge to factual situations.

Weaker students did not identify which courts or judges were bound or persuaded by the precedent, or which courts or judges could use any or some of the methods to avoid following the precedent.

Again, this is an example of a question that required the student to put forward a statement – that is, to what extent are judges bound to follow the new precedent. Many did not do this.

The following is an example of a good answer.

Some judges are bound to follow the new precedent, but others are not. In this case, judges in the County and Magistrates’ Courts are bound to follow the precedent set by the Supreme Court, as they are lower in the hierarchy, unless the judge is able to use one of the methods available to him/her to avoid following it. For example, the judge may be able to find some of the facts are distinguishable so that he/she is not required to follow the new precedent.

Courts higher than the Supreme Court are not bound by the new precedent, but may be persuaded by the decision. Higher courts may be inclined to follow the precedent, or they may decide on their case differently and therefore choose not to follow the precedent, therefore overruling the precedent made in this case.

If this case goes on appeal, the appellate judge may decide that the decision made by the Supreme Court was wrong and he/she may decide to reverse the earlier decision, thus creating a new precedent.

Finally, judges in other hierarchies, such as New South Wales courts or courts overseas, are not bound to follow the new precedent but again may be persuaded to follow it.

Question 9

Marks	0	1	2	3	4	5	Average
%	8	14	22	25	18	13	2.7

The question required students to evaluate the role of the judge. They needed to look critically at the strengths of the role of the judge, then consider whether they are actually strengths by contrasting the strengths with corresponding weaknesses.

Some of the strengths that could have been discussed are:

- a judge is an independent and impartial umpire who does not favour either side, thus ensuring a fair and unbiased hearing
- the judge can ask questions of a witness to clarify any confusion, ask for clarification from a party or question a party’s submissions where necessary. While they do this without favouring any side, it ensures that it clears up any ambiguities that may arise in the case
- judges, particularly those in the Supreme Court, have significant expertise in various matters, and as they are the deciders of any relevant law this ensures that the law is applied properly and appropriately
- the judge’s role in the adversary system, particularly in the Supreme Court, has expanded in areas such as timetable management, giving directions at regular hearings and providing guidance as to how discovery and evidence can be limited by requiring the parties to agree to the facts that are in dispute
- the independence of judges underpins the judicial system and, as such, parties can ensure that judges with no relevant connections with the case, the parties involved in the case or the witnesses will try their case.

Some of the corresponding weaknesses that could have been used are:

- judges are often the most experienced people in the courtroom yet their role is limited to things such as ensuring the rules of evidence and procedure are followed and deciding questions of law. They cannot help an unrepresented party in the trial and therefore their expertise is often not utilised
- judges cannot get involved in what evidence should be led, which witnesses are to be called, or investigate matters, thereby risking a situation where decisions are made on only that evidence the parties choose to use
- judges cannot determine a verdict of guilt or innocence in a criminal trial, even though they may be the best person to judge the facts, evidence and law.

This question highlighted the need for more work in developing evaluation skills. It was not enough for students to simply explain two strengths and two weaknesses without demonstrating how a weakness reflects on or hinders that



strength. Students must also ensure they read the question carefully as many described the role of the judge and compared it to the role of a judge in the inquisitorial system; this is not what the evaluation required them to do.

This question also highlighted the need for students to increase their knowledge and understanding in this area. Many simply argued that the judge should have a more active role, like judges in the inquisitorial system, given their expertise and knowledge of the legal system. However, students were expected to go further than this and ask themselves how this would improve the adversary system (perhaps by linking it to the elements of an effective legal system) or whether it would in fact improve the adversary system at all (perhaps by considering how a more active role, for example, would impact on the strengths of the judge's role, such as him/her being impartial).

The following is an example of a good answer.

The role of the judge in the adversary system is to act as an impartial, independent and unbiased adjudicator. Their role is advantageous as it allows access by the parties to a fair and unbiased hearing, ensuring that the judge is not partial to either party. Judges also ensure that every party is subject to the rules of evidence and procedure, ensuring that no one party is more advantaged than the other. By remaining removed from any investigate role or acting as an advocate for any party, the judge is in the best position to reach an objective decision based on facts and evidence. The judge also ensures that the rules of evidence and procedure are followed by the parties in trial, and are having more of an active role in trial management by conducting directions hearings and directing parties to attend mediation.

However, some often argue that as the most highly trained and skilled person in the courtroom, the judge is not adequately used to their full potential. As they are not involved in gathering evidence or questioning witnesses, it is thought by many that this often adds to the length of the trial (as parties gather their own evidence) or results in unfair outcomes (as it is up to the parties and not the judge to determine what evidence to put forward). Having said that, the strengths far outweigh the weaknesses, as having the judge play a more active role could result in him/her potentially becoming biased.

Question 10

Marks	0	1	2	3	4	5	Average
%	18	13	19	23	17	10	2.4

There are three methods of changing constitutional power that are listed in the study design and students should be familiar with each: the referendum process, interpretation by the High Court and state referral of powers to the Commonwealth Parliament. The question asked students to identify one of those methods and analyse its impact on the division of law-making powers. The discriminating factor here was the analysis. Responses that merely described the process or method did not gain full marks.

Points that could have been made about each of the methods are as follows.

Referendum

- the referendum process has had very little impact on the division of law-making powers. Some of the reasons for this are:
 - a lack of understanding; many have claimed that voters have not understood the process and/or the proposal and have tended to vote 'no' as a result
 - it is hard to get a 'yes' vote by the majority of electors in Australia and 'yes' by the majority of states (at least four out of six)
 - voters are usually reluctant to change
 - voters tend to vote in accordance with their political party
- some of the changes agreed to in the past (for example, the retirement of judges in 1977 and terms of senators in 1984) have had no impact on the division of law-making powers and are relatively uncontroversial amendments
- the low percentage of successful referenda suggests that people are only prepared to say yes on those changes considered absolutely necessary (for example, in 1967) – although this means there is some stability in the division of law-making powers
- voters may not wish to increase the power of the Commonwealth, which is the focus of many referenda.

Referral of powers

- this is an optional process available to states, who can refer any of their law-making powers to the Commonwealth
- states have traditionally been reluctant to hand over power and this has not happened often in the past
- it allows states to confer powers that are best left to the Commonwealth, for example terrorism, to ensure a unified approach to an area of law



- uniformity of laws between states is often difficult to achieve, as often one or more states do not pass the same law or make changes to it
- it can often result in states losing power that they may otherwise want to have retained had they not referred it to the Commonwealth
- it has a decentralising effect, whereas states could cooperate and pass uniform laws.

High Court interpretation

- while there has been a number of cases that have changed the division of law-making powers, it could be argued that the High Court has not often changed the division of law-making powers
- this can act as a check and balance on a parliament (state or Commonwealth) that may have made a law that is not within their power
- the High Court cannot change the words in the Constitution, therefore its role is limited to interpretation
- the Court has to wait for a relevant case to arise in order to interpret the Constitution. Often it is expensive and time consuming to take a case to the High Court
- only a party with standing can apply to have the case heard
- there have been a number of cases which have had significant impact on the division of law-making powers, including the Tasmanian Dam case, Roads case and First Uniform Tax case.

Students did not handle this question well. An analysis of the impact of law-making powers was often not evident in their responses. Instead, students identified the method and then went on to explain the process. For example, those who chose to discuss the referendum process went on to discuss the process of going through parliament, then double majority, then royal assent. This was not what the question asked. Students could have analysed the impact of the referendum process on the law-making powers without describing the process. For those who chose High Court interpretation and referral of powers, many merely described one case/example of when a change in law-making powers occurred. While an example could be used to support the student's analysis, it was not necessary to give detailed facts about that example.

It was pleasing to see some students choose the referral of powers as their method. This is a new area in the study design and there were some good responses about state referral of powers.

The following is an example of a good answer.

One method of changing constitutional power is through High Court interpretation.

The High Court can interpret the Constitution, but cannot change its actual words; therefore whilst it can change the balance of powers, it is limited to interpretation only (which can therefore be changed by way of a later High Court interpretation in a different case).

This method has been an effective means of changing the balance of lawmaking powers, however, it normally changes it in favour of the Commonwealth Parliament, therefore reducing state powers. Examples of this include the Engineers case in 1920 where the Constitution was interpreted broadly, thus increasing the legislative power of the Commonwealth Parliament, and the more relatively recent Tasmania Dam case, where again the powers of the Commonwealth increased in relation to its external affairs power and the implementation of international treaties.

However, whilst the High Court can and has changed the balance of powers, it is costly and time consuming to take a case to court, therefore it does not often happen. It also requires a case where there is a constitutional issue, and where a party has standing, that is, has the right to take the case to the High Court. That means that the High Court cannot just simply change the Constitution whenever it wants to; it has to wait for a case to come before them. As stated, this is often rare.

Question 11

Marks	0	1	2	3	4	5	6	Average
%	19	16	18	17	14	9	8	2.5

Many students struggled with this question. Civil pre-trial procedures form part of the key knowledge in Unit 4, Area of Study 2 and students are expected to have an understanding of what they are as well as their purposes. The question asked the student to take a stance: whether or not pre-trial procedures achieve effective access to the legal system and why or why not. The calibre of the discussion was the discriminating factor.

Students could have argued that pre-trial procedures achieve effective access to some extent but not always. This was an acceptable stance to take, as long as there was a discussion supporting that stance. Other students stated that civil pre-trial procedures did not achieve effective access but achieved other benefits such as a fair and unbiased hearing or timely resolution of disputes. Again, this was acceptable, as long as the reasons why pre-trial procedures did not achieve effective access were discussed.

2011 Assessment Report



Although not necessary to achieve full marks, many students went into detail about some of the pre-trial procedures (such as pleadings, discovery and directions hearings) to support their answer. Other students took a global approach and discussed pre-trial procedures broadly. Both approaches were acceptable.

Stronger responses discussed the ways some pre-trial procedures achieved effective access, such as mediation as a pre-trial procedure and directions hearings. These responses then went on to discuss that to some extent pre-trial procedures hinder effective access to the legal system due to the costs involved, the need for legal representation to understand what needs to occur and the delays in having the matter heard in court due to the nature of the procedures. Those students who argued that pre-trial procedures do absolutely achieve effective access to the legal system found it more difficult to argue their point.

The following is the start of a good answer.

Civil pre-trial procedures can both contribute and hinder effective access to the legal system.

Many of the pre-trial procedures are intended to encourage the parties to reach an out of court settlement. For example, the judge may order at a directions hearing that the parties attend a mediation. At mediation, the parties may reach an agreement amongst themselves, therefore reducing the need to go to trial, which can often be expensive. This increases effective access as it ensures the parties have access to other dispute resolution methods.

However, civil pre-trial procedures are often complex and parties may be unable to prepare all of the documents themselves, thus requiring legal representation. This increases the time and cost it takes to have the matter heard in court. For example, Andrew may be required to discover hundreds of documents or require his lawyer to prepare complex documents, thus increasing the cost. This decreases access to the legal system for some people, for example those from low socio-economic backgrounds, who may not have enough money for legal representation or to prepare certain documents (such as those required in the pleadings stage, for example request for particulars), and thus may be discouraged from initiating court proceedings.

Question 12

Marks	0	1	2	3	4	5	6	7	8	Average
%	6	4	9	13	17	16	15	10	9	4.4

A comparison requires a consideration of similarities and differences. Both courts and VCAT are dispute resolution bodies and, while they have some similarities in the way they resolve disputes, there are also differences. A description of one dispute resolution method was also required.

Some of points that could be made are as follows.

Similarities

- Both involve an independent, external body (tribunal or court) to determine and resolve the dispute.
- Both involve an application fee and documents to be filed (writ/application form), although the fees and documents differ between VCAT and courts.
- Courts and VCAT engage independent third parties who are skilled in their areas of expertise to hear the case and make a determination.
- Both courts and VCAT can refer a case to mediation or a case conference in an attempt to resolve it before hearing.
- Legal representatives can be engaged in both courts and VCAT, although in some VCAT lists legal representatives are not allowed.
- The parties can still appeal a decision of VCAT as they can in courts (except for a full bench High Court decision).
- Both make a binding decision on the parties.

Differences

- VCAT is a one-stop shop, with different lists that deal with different subject matters/areas of law, whereas courts' jurisdictions in civil cases are determined by the amount of damages that are being sought.
- There is one VCAT with different lists and no hierarchy; there are a number of courts in a hierarchy.
- VCAT is much cheaper – normally a \$36 application fee as opposed to a court filing fee, which can be over \$1000 in the Supreme Court.
- Some VCAT lists disallow the use of legal representatives, whereas in the court system legal representation is usually required to deal with complex pre-trial procedures.
- A binding decision in a court can be immediately enforced, whereas a VCAT decision has to be certified in the Magistrates' Court before it can be enforced.



- VCAT members are usually non-judicial (except for the president and vice-presidents) and can be casual, sessional members, whereas courts utilise judges.
- VCAT is more informal, whereas courts use formal procedures and rules of evidence.
- VCAT hearings are often quicker and heard faster than a court hearing.
- VCAT does not normally use complex pre-trial procedures, as opposed to courts.

Dispute resolution method (Students should note that both VCAT and courts use each of the following methods.)

- mediation
- conciliation
- arbitration
- judicial determination (note that some VCAT members can judicially determine cases – that is, when the president or vice-president is hearing the matter).

Many students struggled with this question. Some read it to mean a discussion about the strengths and weaknesses of courts and VCAT; therefore, they did not answer the question. Many students began discussing the similarities and differences between dispute resolution methods – that is, they explained that courts judicially determine cases and VCAT mediates and then compared judicial determination and mediation. This is not what the question asked. Courts and VCAT are dispute resolution bodies and each have their own way of resolving disputes. Students were required to undertake a comparison of the way disputes are resolved by each, not a comparison of the actual dispute resolution methods.

There were some common misconceptions about courts and VCAT, and how they resolve disputes that need to be addressed. For example, some students stated that VCAT uses mediation and conciliation whereas courts use arbitration and judicial determination. The above dispute resolution methods are not exclusive to either courts or VCAT; courts are able to refer matters to mediation, and VCAT can judicially determine cases. Some students also had a misconception that VCAT decisions are not binding on parties. VCAT decisions are binding; although a VCAT decision needs to be certified in the Magistrates' Court before it can be enforced, this does not make the order any less binding on the parties.

The structure of answers was important in responding to this question. Stronger students methodically described the similarities and differences, incorporating the dispute resolution method into their answer (for example, by stating as one of their similarities that both courts and VCAT use mediation as a dispute resolution method before describing mediation). Weaker students made brief points about the similarities and differences (for example, by stating that VCAT is cheaper than courts without explaining why) or did not adequately describe the dispute resolution method.

The following is the beginning of a good answer.

Both the courts and VCAT are dispute resolution bodies. Both of them use a variety of dispute resolution methods, including mediation. Mediation involves the use of an impartial third party known as a mediator who facilitates a discussion between the two parties to assist them in reaching a final decision. The mediator does not make the final decision and is required to remain unbiased and encourage the parties to stay 'on task'. Both courts and VCAT regularly use mediation as a form of dispute resolution.

The courts are much more formal in resolving disputes, using rules of evidence and procedure in conducting a hearing. VCAT, on the other hand, is a more informal atmosphere where it is intended for parties to feel more comfortable and less intimidated than the courtroom.

Question 13

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	7	5	8	9	10	11	11	11	10	8	10	5.3

This question combined content from both Units 3 and 4. It required students to discuss the extent to which they agreed or disagreed with the statement that the jury system is outdated and should be abolished, and also to describe the role of the VLRC. The task words should have given students a guide to how much time should be spent on each part: the first task word, 'discuss' the extent..., should have given students a signal they needed to spend more time on this part of the question than on the description of the role of the VLRC.

The extent to which the student agreed or disagreed needed to be stated. Students could have taken either approach; the discriminating factor was in the discussion. Reforms or alternatives to the jury system were not required to gain full marks, but some students did make a point about a possible alternative or reform if they argued that the jury system should be abolished or should simply be modified.



The role of the VLRC could have been addressed at the start or end of the response. Some students were too vague or brief in describing the role of the VLRC and therefore did not gain full marks for this part.

It is important for students to read the question carefully. Some simply described strengths and weaknesses of the jury system without any attempt to relate it back to the statement or to the stance they took.

The following points could have been made.

Some strengths of the jury system are:

- the decisions reflect the views of the common person/community
- juries are independent and impartial
- juries are a cross-section of the community and reflect prevailing community attitudes
- juries ensure the system remains intelligible to the ordinary person and involves the community
- decision-making is spread across a number of people
- there is less likelihood of a wrong decision being handed down
- juries provide a trial that is free from political interference
- juries can act as a social conscience
- juries ensure that the hearing of evidence is conducted in an open forum
- juries have stood the test of time and have historical significance.

Some weaknesses of the jury system of trial are:

- jury deliberations are kept secret and reasons do not have to be given
- juries may not be a true cross-section of the community as people are able to be challenged or excused for a good reason
- juries can add to the cost and length of a trial
- jurors may not understand or recall evidence that can be complex and technical
- jurors may be influenced by factors other than the facts before them (for example, rhetoric of counsel) or they may be influenced by bias and prejudice
- juries have been criticised because of their high acquittal rate
- juries may have difficulty reaching a decision, even though majority verdicts are now accepted in all cases but murder and treason.

The VLRC:

- reviews the current law
- finds out how it is operating in practice
- discovers any problems or omissions
- consults the public and interested parties and groups
- formulates a report.

The VLRC can use a variety of strategies including internal research and contributions from the public, community organisations, academics, lawyers, government and private sector organisations. It calls for submissions from these groups, holds face to face consultations in rural and metropolitan areas, prepares issues and discussion papers, and prepares final reports.

The following is the beginning of a good answer.

Despite some flaws in its operation, the jury system remains the most effective way of reaching a fair and just decision. The jury system has withstood the test of time and is the cornerstone of our legal system as it provides society a voice in our justice system. I therefore do not agree with the above statement.

First, the jury system reflects community values through its cross-section representation of society. The jury is randomly selected from the electoral roll and come from all walks of life, age, gender, education, occupation and nationality. The jury system enables a trial by one's peers and therefore is reflective of current social and moral standards. Some people argue that the jury is not a true cross-section of the community as the legislation enables some people to be excused, whilst stating that some are disqualified or ineligible. However, whilst the current system means that some members of the community are not required to (or are not allowed to) sit on a jury panel, it is a far better system than, for example, a professional jury or a panel of judges, where there could be issues of bias as well as a far less representation of the community.